Tharan Gregory Lanier (State Bar No. 138784)
tglanier@JonesDay.com
Nathaniel P. Garrett (State Bar No. 248211)
ngarrett@JonesDay.com
Joshua L. Fuchs (*Pro Hac Vice*)
jlfuchs@JonesDay.com
Joseph M. Beauchamp (*Pro Hac Vice*)
jbeauchamp@JonesDay.com
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: +1.415.626.3939
Facsimile: +1.415.875.5700

Kenneth A. Gallo (*Pro Hac Vice*)
kgallo@paulweiss.com
William B. Michael (*Pro Hac Vice*)
wmichael@paulweiss.com
J. Steven Baughman (*Pro Hac Vice*)
sbaughman@paulweiss.com
Crystal M. Johnson (*Pro Hac Vice*)
cjohnson@paulweiss.com
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street NW
Washington, DC 20006-1047
Telephone: +1.202.223.7356
Facsimile: +1.202.204.7356

Kristin L. Cleveland (State Bar No. 184639)
kristin.cleveland@klarquist.com
John D. Vandenberg (*Pro Hac Vice*)
john.vandenberg@klarquist.com
J. Christopher Carraway (*Pro Hac Vice*)
christopher.carraway@klarquist.com
Garth A. Winn (*Pro Hac Vice*)
garth.winn@klarquist.com
Mark W. Wilson (*Pro Hac Vice*)
mark.wilson@klarquist.com
Kyle B. Rinehart (*Pro Hac Vice*)
kyle.rinehart@klarquist.com
Roy Chamcharas (*Pro Hac Vice*)
roy.chamcharas@klarquist.com
KLARQUIST SPARKMAN, LLP
121 SW Salmon Street, Suite 1600
Portland, OR 97204
Telephone: +1.503.595.5300
Facsimile: +1.503.595.5301

Attorneys for Defendant/Counterclaim-Plaintiff SAP SE and Defendants SAP AMERICA, INC. and SAP LABS, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TERADATA US, INC.,
Plaintiff,

and

TERADATA CORPORATION and TERADATA OPERATIONS, INC.,
Plaintiffs/Counterclaim-Defendants,

v.

SAP SE,
Defendant/Counterclaim-Plaintiff,

and

SAP AMERICA, INC. and SAP LABS, LLC,
Defendants.

Case No. 3:18-cv-3670-WHO (JCS)

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

Date:	**October 13, 2021**
Time:	**2:00 P.M.**
Judge:	**Hon. William H. Orrick**
Courtroom:	**2, 17th Floor**

***** REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED *****

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 13, 2021 at 2:00 p.m., or as soon thereafter as the matter may be heard, before the Honorable William H. Orrick, District Judge of the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California, Defendants SAP SE, SAP America, Inc. and SAP Labs, LLC (collectively "SAP" or "Defendants") will, and hereby do, move the Court for an Order under Federal Rule of Civil Procedure 56 granting summary judgment, in whole or in part, on the claims against them. This motion is made and based upon this Notice of Motion and Motion for Summary Judgment, the accompanying Declaration of Tharan Gregory Lanier and exhibits attached thereto, the accompanying Declarations of Greg Anicich, Lauren Stiroh, Tim Kraska, Gregory K. Leonard, Sharad Mehrotra, and Kevin Murphy and exhibits attached thereto, the complete files and records in this action, oral argument of counsel, and such other and further matters as the Court may consider.

Dated: August 25, 2021

JONES DAY

By: *s/ Tharan Gregory Lanier*
Tharan Gregory Lanier

Counsel for Defendant/Counterclaim-Plaintiff SAP SE and Defendants SAP AMERICA, INC. and SAP LABS, LLC

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GLOSSARY

Data Lake
A storage repository that holds vast amounts of raw data in its native format until it is needed.

Data Mart
A data repository focused on a particular line of business, department, or subject area, which allows defined users to analyze a restricted area of data without wasting time searching through an entire data warehouse.

Enterprise Data Warehouse ("EDW")
A central repository that gathers vast amounts of data from multiple sources across an entire business enterprise and stores it in a format capable of analysis.

Enterprise Resource Planning ("ERP")
A category of business management software—typically a suite of integrated applications—that an organization can use to collect, store, and manage transaction-based data.

Online Analytical Processing ("OLAP")
OLAP applies complex queries to historical data, aggregated from OLTP databases and other sources, for data mining, analytics, and business intelligence projects.

Online Transactional Processing ("OLTP")
OLTP captures, stores, and processes data from transactions in real time.

HANA
SAP database product that combines analytical and transactional processing in a single column store in-memory database.

Relational Database
A database system that stores data in relational form, *i.e.*, as a collection of tables with each table consisting of a set of rows and columns.

S/4HANA
SAP ERP business suite designed to work with the HANA in-memory database, which allows companies to perform transactions and to conduct focused business analysis in real-time.

Structured Query Language ("SQL")
A programming language used to communicate with relational databases.

Translytical
Database platform that can support diverse workloads, including both transactional and analytical processing.

I. INTRODUCTION

The thrust of Teradata's trade secret case is that SAP misappropriated narrow trade secrets relating to how SAP's enterprise software communicates with HANA, SAP's in-memory database. Teradata purportedly shared these trade secrets with SAP during a joint project between the parties – a project governed by unambiguous contractual terms. Teradata did not mark the purported trade secrets as confidential, as the governing contracts required. And even if it had, the contracts make clear that the alleged trade secrets—suggestions made by a Teradata engineer about [redacted]—belong to SAP. In any event, before filing this suit, Teradata sold away to a third-party investment fund any right to sue on the alleged trade secrets.

Teradata's antitrust claims fare no better. Teradata accuses SAP of attempting to monopolize a market where there are many bigger and more successful competitors. While Teradata has not formally dropped its monopolization claim, its experts do not seriously try to support it with evidence. Under the guise of a tying claim, Teradata also complains that it has been harmed because SAP integrated S/4HANA with HANA. Teradata's reliance on antitrust law is misplaced, because it and SAP offer different products for different purposes in different markets, as Teradata's own documents show and its own executives admit.

II. BACKGROUND

A. The Business Software at Issue.

Teradata says this case is about SAP using its position in Enterprise Resource Planning ("ERP") applications "to gain entrance to and quickly grab market share" in the Enterprise Data Warehousing ("EDW") market, with a database product ("HANA") derived from Teradata trade secrets. (Dkt. 67 ¶ 1.) It is important, therefore, to understand the relationship between four types of business software relevant to this litigation: (1) ERP applications; (2) transactional databases; (3) analytics applications; and (4) analytics databases.

1. ERP Applications & Transactional Databases.

"ERP," which stands for "enterprise resource planning," is software used by organizations to manage day-to-day business activities such as finance, accounting, human resources, project

management, supply chain operations, and procurement processes. (Decl. of Lauren Stiroh Ex. ¶ 10; Ex. 84.) There are a number of distinct ERP segments, each with distinct competitors. (Decl. of Greg Anicich Ex. ¶¶ 9, 35.)

An ERP application sits on top of a "transactional" database that serves as the data repository. (Anicich Decl. Ex. ¶¶ 24-28; Decl. of Tim Kraska Ex. ¶ 19; Ex. 38 at 18:22-19:13.) Transactional databases are configured to optimize storage and retrieval of all data relating to individual transactions. (Ex. 39 at 17:16-18:11.)[1] Transactional databases, also known as "online transactional processing" ("OLTP") databases, typically are "row-based," which is advantageous for processing transactions, such as payroll data, and is efficient at running a large number of relatively simple transactions concurrently. (Decl. of Sharad Mehrotra Ex. ¶ 53.)

For many years, ERP vendors designed their applications to run on multiple databases, "porting" their applications to various databases. (Ex. 17 at 75:16-76:12.) However, because each database runs commands differently, it is necessary for ERP vendors to configure certain commands separately to operate with each specific database. (Mehrotra Decl. Ex. ¶ 36.) This "porting" requires programmers from the ERP vendor to work alongside experts from the database vendor to configure relevant commands in the application to operate efficiently in the database. (Kraska Decl. Ex. ¶ 160.) Porting involves considerable testing and redesign efforts to ensure optimum performance. (Mehrotra Decl. Ex. ¶¶ 113-114.)

This all began to change during the late 1990s. Oracle acquired J.D. Edwards, PeopleSoft, Siebel, and other vendors to become a vertically-integrated ERP applications and database provider. (Anicich Decl. Ex. ¶ 36.) Microsoft followed suit by acquiring Dynamics, Navision, and Great Plains Software. (*Id.*) Over the following decade, [redacted] (*Id.* ¶¶ 37-38; Ex. 17 at 35:1-4, 76:13-20.) [redacted]

[1] Unless otherwise noted, Exhibit citations refer to the exhibits attached to the concurrently-filed Declaration of Tharan Gregory Lanier in Support of SAP's Motion for Summary Judgment.

[redacted] (Anicich Decl. Ex. ¶ 38; Ex. 17 at 20:18-21:9.) To this day, [redacted] (Ex. 17 at 13:20-14:2, 30:19-31:1, 41:12-20; Ex. 74 ¶ 4.)

2. Analytical Applications & Analytical Databases

Some companies buy analytical software to analyze historical transaction data. These analytics applications allow companies to analyze aggregated data to gain insight that may help make important business decisions. (Mehrotra Decl. Ex. ¶ 59.) Analytics applications are designed to run on a second type of database, known as an analytics or "OLAP" database. (Ex. 38 at 18:22-19:13; Ex. 21 at 158:8-159:6.) These databases typically store data in columns, to optimize the running of a small number of queries with a large number of complex records. (Mehrotra Decl. Ex. ¶ 60; Kraska Decl. Ex. ¶ 22.)

The industry differentiates among at least three different types of analytic databases: (1) data marts; (2) enterprise data warehouses; and (3) data lakes. (Ex. 38 at 14:6-14.) Data marts are relatively small to mid-sized structured analytics databases that draw data from a single or a small number of data sources and are set up to meet the limited analytics requirements of a particular division or business case. (*Id.* 14:15-15:5; Ex. 39 at 18:16-22; Ex. 64 ¶ 82.) Enterprise data warehouses are large structured analytics databases that draw data from different sources (such as OLTP databases) across an enterprise and can support the general analytics requirements of an entire enterprise. (Ex. 38 at 13:4-21; Ex. 42 at 28:5-29:5; Ex. 22 at 12:4-20.) Finally, data lakes are vast, often unstructured, stores of enormous quantities of data. (Ex. 38 at 15:16-16:6; Ex. 42 at 34:24-35:19.) Data lakes provide inexpensive and efficient storage of rarely-used data, but offer only limited support for analytics. (Ex. 38 at 16:7-17:2.)

Modern enterprises often use various combinations of these products. A typical large company might have ERP applications from 3-5 different ERP vendors, each running on a different transactional database. (Ex. 12 at 110:18-111:15; Kraska Decl. Ex. ¶ 17; Anicich Decl. Ex. ¶¶ 19, 46-48.) It might also have an enterprise-wide data warehouse to support general-purpose analytics, as well as data marts supporting specific analytics use cases, augmented by a

data lake for general data storage. (Ex. 13 at 51:12-52:16; Ex. 48 at 13.)

B. The Parties' Core Products.

Teradata's traditional flagship database product is an enterprise data warehouse. (Ex. 43 at 15:1-8.) As an OLAP database, Teradata's EDW product lacks the functionality to support ERP applications; it is designed, rather, for use with analytical applications. (Ex. 69 (RFA 292); Mehrotra Decl. Ex. ¶¶ 119, 127-128; Stiroh Decl. Ex. ¶ 21.) According to Teradata's corporate witness, [redacted] (Ex. 43 at 22:8-15.)

SAP is best known as a developer of ERP software, historically designed to run on various transactional databases, including OLTP databases manufactured by Oracle, IBM, and Microsoft. (Anicich Decl. Ex. ¶ 39.) SAP's ERP applications do not, and have never, run on top of Teradata's analytical database. (Ex. 70 (RFA 289); Mehrotra Decl. Ex. ¶ 127.) SAP's most recent ERP application, S/4HANA, is integrated to operate on top of SAP's HANA database (Anicich Decl. Ex. ¶ 40), as discussed more fully below.

C. The Bridge Project

In 2008, SAP and Teradata entered into a joint project—termed the "Bridge Project"—for the purpose of modifying certain SAP products (including a database known as MaxDB, and a SAP data warehouse known as Business Warehouse, BW, or BI) so that they could together operate on top of Teradata's OLAP database. (Ex. 33 at 33:6-21; Kraska Decl. Ex. ¶ 161; Ex. 55 at Appendix 1 § 3.) In effect, the Bridge Project contemplated assembling a "stack" of SAP products on top of the Teradata database. (Ex. 59 at Slide 5; Ex. 2 at 22:20-22.) At the top of the stack was SAP BW/BI, an analytical application and database capable of extracting data from SAP ERP applications and providing rudimentary analytical processing of that data. (Kraska Decl. Ex. ¶¶ 154-158.) SAP BW/BI, in turn, sat on SAP's MaxDB, a transactional database. (*Id.* ¶ 161.) Teradata's OLAP database sat at the bottom of the stack. (*Id.*) The "bridge"—also known as "Teradata Foundation"—was the software layer designed to communicate with Teradata's database and, critically, was a component of SAP's MaxDB. (Ex. 36 at 65:12-16,

224:11-225:15.) Other than the Teradata database, all of the other components in the stack were SAP products. (Kraska Decl. Ex. ¶ 161.)

[redacted] (Ex. 28 at 32:12-17.) [redacted] (Ex. 27 at 27:21-28:4.) [redacted] (*Id.* at 29:4-8.)

To reflect these realities, the parties entered into three contracts that governed the Bridge Project: a Software Development Cooperation Agreement ("SDCA") and two non-disclosure agreements ("2008 MNDA" and "2009 MNDA"). [redacted] (Ex. 55 § 4.2.) [redacted] (*Id.* § 5.5.)

[redacted] (Ex. 55 § 10.1) [redacted] (*Id.* § 10.3.) [redacted] (*Id.* §§ 1.7-1.8.)

As Teradata was well aware, it was not the only database provider working with SAP on this kind of project. (*See* Ex. 55 § 2.3 [redacted]

[redacted] SAP was simultaneously working with Hewlett Packard to support an HP database (named Neoview) under the same stack of SAP software. (Ex. 33 at 33:6-21; Ex. 30 at 38:10-16; Exs. 61, 62.) The Bridge Project thus was just one aspect of a larger project to modify SAP's products to be able to interoperate with various OLAP databases. (Ex. 33 at 85:16-86:5.) Accordingly, any changes made to SAP products as a result of SAP's collaboration with Teradata necessarily would be made available to databases outside the Bridge Project – another fact of which Teradata was aware. (Ex. 52; Ex. 15 at 13:5-12, Ex. 27 at 88:25-89:16.) After all, and as Teradata's witness put it, [redacted] (Ex. 27 at 88:25-89:16.)

D. SAP's HANA Translytical Database.

Historically, SAP designed its ERP applications to run on a number of transactional databases, including Oracle, IBM, and Microsoft databases. (Anicich Decl. Ex. ¶ 39.) [redacted] (*See, e.g., id.* ¶ 39.) [redacted] (*See, e.g., id.*; Ex. 88 at 237, 268; Ex. 89 at 59; Ex. 87 at 219.)

Before, during, and after the Bridge Project, SAP spent years developing its own database, HANA, to sit under its ERP applications. (*See* Kraska Decl. Ex. ¶¶ 164-174.) Years before the Bridge Project, SAP's co-founder, Hasso Plattner, and students with whom he worked, conceived the idea of building a new database as a means for improving the performance of SAP's ERP applications. (*Id.* ¶ 164; Ex. 83; Ex. 78.) SAP, in conjunction with Dr. Plattner and his students, concluded that only by controlling the structure and operation of the underlying database could an ERP application achieve the full extent of the improvement sought. (Ex. 81; Ex. 82; Ex. 91; Ex.

83.)

HANA was created by SAP developers who borrowed code from three other SAP database products: P*Time, TREX, and MaxDB. (Ex. 30 at 14:9-14; Ex. 29 at 23:18-32:18; Ex. 7 at 22:23-25:9.) SAP developers built upon that code to create a database that can support both transactional and analytics applications: a so-called "translytical" database. (Ex. 79 at 11; Ex. 80 at 8.) HANA permits customers to support their ERP applications with enhanced speed and efficiency, and also to run analytics queries against the transactional data generated by those applications without the need to copy data. HANA is an "in-memory database," and the relatively high cost of storing data in memory rather than on disk makes HANA best suited for supporting transactional applications or limited, clearly defined analytics use cases (a data mart), rather than use as an analytical database for storing large amounts of data from across an entire enterprise (an EDW). (*See* Ex. 22 at 15:4-16:3; Ex. 13 at 47:15-49:17; Ex. 32 at 259:19-260:21; Ex. 77; Ex. 79.)

By early 2013, SAP had modified its ERP applications to run on HANA (along with other databases). As SAP explored the operation of its ERP applications on HANA, it discovered more and more functionality that it could offer only, or optimally, by designing applications specifically to take advantage of HANA's new features. (Ex. 32 at 164:21-165:12; Ex. 34 at 97:8-20; Ex. 16 at 61:21-67:21.) In January 2013, SAP launched an effort to port new developments, or "Optimizations," to the Oracle and IBM transactional databases. (Ex. 85.) By late 2013, SAP encountered significant difficulties porting to other databases a set of optimizations designed for ERP running on HANA. A report to SAP's Executive Board reported that all four milestones were missed, the planned porting was not included in the late 2013 ERP product shipment, and an RFP for additional porting work was put on hold pending further review. (*Id.*) SAP arranged a test in late 2013 to work with IBM engineers and determine whether, working together, they could modify IBM's DB2 database to support the new functionality. The test "failed miserably." (Ex. 35 at 30:22-32:3; Ex. 12 at 108:4-16.)

In January 2014, SAP decided to "split the code line" and to create a new ERP application designed specifically to run on HANA and to take advantage of its unique functionality. (Ex. 35

at 14:10-16:4; Ex. 11 at 190:5-191:21.) SAP was able to create an ERP application with a streamlined design capable of pushing many of the required calculations down into the HANA database, where they could be performed more efficiently. (Ex. 35 at 32:4-33:17; Mehrotra Decl. Ex. ¶¶ 135-160.) And because SAP did not port the application to other databases, SAP was able to reduce development and testing costs, and to accelerate the design, completion, and release of the new product. (Mehrotra Decl. Ex. ¶¶ 176-177.) In 2015, SAP released its first suite of newly designed ERP applications, named S/4HANA.

Customers were used to purchasing a SAP ERP application along with a limited-use database license, and SAP continued this practice by offering HANA either with a full-use license (with no restrictions on how the data within HANA can be used), or a lower-cost limited-use (or "runtime") license (with database use limited to supporting S/4HANA). (Ex. 45 at 105:19-115:12; Ex. 37 at 15:7-15; Ex. 19 at 64:23-65:5.)

E. Today's Dynamic and Competitive Database Market.

In recent years, a number of new technologies have had a substantial impact on the competitiveness of the database market. Most importantly, the emergence of cloud computing opened new opportunities for customers and a whole new dimension of competition. (Ex. 12 at 23:15-24:17.) A customer may choose to take software as a service ("SaaS"), in which case the customer contracts for use of the ERP applications of its choosing, and the cloud vendor is responsible for operating and maintaining the collection of hardware, operating systems, databases, and middleware necessary to deliver the ERP services to the customer. (Anicich Decl. Ex. ¶ 26; Ex. 74 ¶ 4; Ex. 32 at 159:10-165:5; Ex. 18 at 22:1-23:22.) [redacted] (Ex. 25 at 41:14-42:13; Ex. 44 at 41:24-42:14.) [redacted] (Decl. of Gregory K. Leonard Ex. ¶ 76; *see also id.* ¶¶ 69-79.)

[redacted] (Ex. 90.) [redacted] *Id.* at Slides 4, 16.) [redacted]

[redacted] (*Id.* at Slide 14.) [redacted] [redacted] (Ex. 95.)

Less than two weeks later, however, Teradata filed this lawsuit. In a fortnight, SAP HANA went from being [redacted] to being the product of the theft of Teradata's trade secrets. (Dkt. 67 ¶¶ 41-49.) Teradata's database and HANA went from being [redacted] to being directly competitive. Whereas Teradata previously described SAP as [redacted], Teradata now claimed that HANA was an EDW product that threatened to monopolize the market. (*Id.* ¶¶ 58-79.) In addition to massive damages, Teradata requested a court injunction, seeking to prohibit the very sales of S/4HANA on HANA that just days earlier it had [redacted]. (*Id.* at p. 36.)

III. LEGAL STANDARD

Summary judgment on a claim is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" with respect to an essential element of the non-moving party's claim on which the non-moving "party will bear the burden of persuasion at trial." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify specific facts showing there is a genuine issue for trial, based on affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986). On summary judgment, the Court draws all reasonable factual inferences in favor of the non-movant, *id.* at 255, because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony does not raise genuine issues of fact. *See Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

IV. ARGUMENT

A. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON TERADATA'S TRADE SECRET CLAIMS.

After extensive discovery, Teradata has tapered back its grandiose trade secret allegations (*see* Dkt. 1 ¶ 1), and now focuses on one discrete category of technical trade secrets—relating to a supposed [redacted] (Ex. 72 at Nos. 24-31 and 58-59)—that concerns the interface between SAP applications and HANA (plus three categories of inconsequential business trade secrets based on information supposedly brought over to SAP by former Teradata employees [Ex. 72 at Nos. 54-56]). Even these narrowed claims fail.

1. Teradata Lacks Standing To Sue.

Teradata's technical trade secret claims, based on information shared during the Bridge Project, fail out of the gate because Teradata lacks standing, having assigned those claims to a third party. Once a claim has been assigned, the assignee is the owner and the assignor lacks standing to sue on it. *In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 897 (C.D. Cal. 2012); *see also Johnson v. Cty. of Fresno*, 111 Cal. App. 4th 1087, 1096 (2003). Teradata assigned the Bridge Project trade secret claims to an investment fund.

(a) Teradata Assigned the SDCA to Marlin.

[redacted] (Ex. 93 at 15.) [redacted] (*Id.* at 2.) [redacted] (Ex. 93 at 42; *id.* at 12.) Teradata specifically identified the SDCA, the contract that "formaliz[ed]" the terms governing the Bridge Project (Dkt. 65 at 3), [redacted] (Ex. 94, Schedule at p. 163). [redacted]

[redacted] (Ex. 58).

(b) Teradata Assigned to Marlin Its Trade Secret Claims.

[redacted]…." (Ex. 93 § 2.1(k).) Teradata's trade secret claims in this case [redacted] By Teradata's own admission, the alleged trade secrets were provided by Teradata "[d]uring the Bridge Project, subject to the terms of the parties' agreements." (Dkt. 67 ¶ 34.) Whether or not Teradata is suing *on* the SDCA, its trade secret claims are tethered to the SDCA: after all, the information Teradata now claims as the subject of its trade secret causes of action was shared pursuant to the SDCA's terms. [redacted] *See Douzinas v. Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1152 (Del. Ch. 2006) (tort claim was "related to" contract because adjudicating claim would require interpretation of contract provisions). [redacted] Teradata thus lacks standing to assert them. *California Bank & Tr. v. Piedmont Operating P'ship, L.P.*, 218 Cal. App. 4th 1322, 1347 (2013).

2. <u>Teradata Failed to Mark the [redacted] as Confidential.</u>

Teradata's [redacted] trade secret claims fail also because Teradata never marked as confidential any of the communications that purportedly disclosed the trade secrets. Teradata's Amended List of Trade Secrets identifies nine trade secrets related to a supposed [redacted] (Ex. 72 at Nos. 24-31, 58-59). Teradata claims all nine trade secrets were provided by Teradata employee John Graas to SAP as part of the Bridge Project. (Ex. 10 at

161:8-11, 169:6-19, 203:3-8, 211:7-212:9.)[2] While Teradata contends [redacted] it is undisputed the communications were not accompanied by an express indicator of confidentiality. (Ex. 67 at 4-5 (Rog. 2).)

Misappropriation occurs when a trade secret is acquired or used under circumstances giving rise to a duty to maintain its secrecy. *See Convolve, Inc. v. Compaq Computer Corp.*, 527 Fed. Appx. 910, 924 (Fed. Cir. 2013). When the parties have entered into written agreements that govern their duties of confidentiality, those agreements "supplant[] any implied duty of confidentiality that may have existed between the parties." *Marketel Int'l, Inc. v. Priceline.com, Inc.*, 36 Fed. Appx. 423, 425 (Fed. Cir. 2002) (citing *Union Pac. R.R. Co. v. Mower*, 219 F.3d 1069, 1076 (9th Cir. 2000)); *see also* Melvin F. Jager, 2 Trade Secrets Law § 22:23 (April 2021) ("California law holds that the existence of a written contract precludes a separate tort claim for misappropriation under the California Uniform Trade Secrets Act."). "If the parties have contracted the limits of their confidential relationship regarding a particular subject matter, one party should not be able to circumvent its contractual obligations or impose new ones over the other via some implied duty of confidentiality." *Convolve*, 527 Fed. Appx. at 925; *see also BladeRoom Grp. Ltd. v. Facebook, Inc.*, 2018 WL 514923, at *8 (N.D. Cal. Jan. 23, 2018) ("the existence of a non-disclosure agreement between BladeRoom and Facebook" defined "the parties' confidentiality obligations with respect to disclosed trade secrets").

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[2] The supposed [redacted] (Ex. 30 at 92:7-16.) In the case of the Bridge Project, the SFAE command had to be issued in the form of a proprietary statement from SAP BW/BI, at the top of the "stack," conveyed to the SAP application server and translated to a SQL statement down to SAP MaxDB, and in SAP MaxDB, the SQL was translated into a new iteration of SQL that was finally passed to the Teradata database. (Ex. 33 at 270:1-271:1; Ex. 30 at 100:5-12; Ex. 23 at 53:7-64:9.) In January 2010, Graas proposed by e-mail that [redacted] (Ex. 46 at 4.) [redacted]: a well-studied technique, known since the 1980s, that is taught in almost any database class which covers distributed database systems. (Kraska Decl. Ex. ¶¶ 193, 235-236, 244-245.) Moreover, a SAP employee, Torsten Pfeiffer, had disclosed the same steps years before, in a November 2008 email to Teradata. (*Id.* ¶ 385.)

(a) The NDAs Contain a Marking Requirement.

According to their plain text—and by Teradata's own admission (Ex. 40 at 27:15-23)—the Bridge Project contracts governed the sharing of confidential information during the Bridge Project. (Ex. 55 § 12.) Recognizing that the parties would be sharing substantial information with each other, and with the evident intention of foreclosing the kind of *post hoc* misappropriation claim that Teradata asserts here, the parties adopted an unambiguous framework for identifying information as "confidential." [redacted] (Exs. 53, 54 § 2.) [redacted] (*Id.*)

(b) Teradata's Communications of the [redacted] Were Never Reduced to Writing and Marked Confidential.

According to Teradata's Amended List of Trade Secrets, the [redacted] was conveyed to SAP in a series of seventeen documents. (Ex. 72 at 8-9.) Yet Mr. Graas conceded at his deposition [redacted] (*See, e.g.*, Ex. 9 at 84:4-17, 93:4-10, 105:5-16, 144:12-20, 187:22-188:17, 218:6-16, 233:7-15.) Rather, [redacted] (*Id.* at 83:4-17, 105:5-16, 108:21-109:8, 187:22-188:21, 233:7-15.) In Mr. Graas's own words, [redacted] (*Id.* at 84:4-17.) And these oral communications were never reduced to writing—let alone marked confidential—as the nondisclosure agreements require to maintain confidentiality. (Ex. 9 at 108:9-19, 188:18-21; Ex. 10 at 186:24-187:11.)

Even if Teradata still intends to rely on the written documents, only two were ever marked confidential – and neither disclosed a trade secret. (Ex. 9 at 72:15-19, 93:4-10, 145:23-146:1, 188:22-189:7, 220:14-17, 222:3-12, 229:1-4, 243:1-6, 258:10-13, 259:21-23, 260:19-21, 262:20-263:1.) The two exceptions—Exhibits 50 and 60—are different versions of a document Mr. Graas created. (Ex. 50 [v.6]; Ex. 60 [v.1]; Ex. 10 at 184:18-185:24, 225:1-12.) Notwithstanding the fact that the document contained *SAP* information—such as a screenshot from SAP BW/BI sent to Mr. Graas by a SAP engineer (Ex. 30 at 74:14-22, 283:11-284:12)—the entire document was labeled "Teradata Confidential."

Graas conceded that version 1 of the document (Ex. 60) [redacted] (Ex. 9 at 109:16-22.) As to version 6 of the document, there is no evidence that Graas ever sent it to SAP. (Ex. 9 at 268:15-21.) In the absence of any evidence that SAP even saw the document, it cannot possibly serve as the predicate for a trade secret claim. *Prostar Wireless Grp., LLC v. Domino's Pizza, Inc.*, 360 F. Supp. 3d 994, 1013-14 (N.D. Cal. 2018). Accordingly, Teradata's trade secret claims boil down to the proposition that SAP misappropriated trade secrets conveyed through unmarked oral communications.

(c) Teradata's Failure to Mark is Fatal to Its Trade Secret Claims.

Because Teradata failed to mark as confidential the communications that supposedly conveyed the [redacted] to SAP, its trade secret claims necessarily fail. *See, e.g.*, *Convolve*, 527 Fed. Appx. at 925 (affirming summary judgment because plaintiff failed to mark as required by governing contracts); *Viasat, Inc. v. Space Sys./Loral, Inc.*, 2014 WL 11889467, at *4 (S.D. Cal. Feb. 4, 2014) (same).

Teradata likely will point this Court to its ruling denying SAP's motion to dismiss on the ground that future evidence might show Teradata "notified [SAP] of confidential information through other means." (Dkt. 65 at 9:7 (citing *PQ Labs, Inc. v. Yang Qi*, 2014 WL 334453, at *4 (N.D. Cal. Jan. 29, 2014)).) Respectfully, the Court should reconsider its interpretation of *PQ Labs* and its relevance to cases, like this one, where an express contractual marking requirement

exists. In any event, there is no evidence Teradata notified SAP through other means that Mr. Graas's communications were confidential.[3]

PQ Labs did *not* hold that the terms of a nondisclosure agreement can be overridden by the parties' conduct. In that case, an independent contractor argued that his employer failed to take reasonable steps to maintain confidentiality because it failed to mark its trade secrets as confidential. 2014 WL 334453, at *3-4. But the employer "used other means to notify its employees and agents that its technological and customer information was confidential." *Id.* Specifically, the employer told the defendant not to disclose the information it claimed as a trade secret, and required the defendant to sign a NDA that required him to keep the plaintiff's information confidential. *Id.* *PQ Labs* did not involve a NDA with a marking requirement at all. It thus does not speak to whether a contract between the parties with a marking requirement can be superseded by an implied duty of confidentiality.

Moreover, the Court's previous construction of *PQ Labs* would not apply here, where the nondisclosure agreements are governed by New York law and contain provisions stating they cannot be modified except in writing. (Ex. 53 § 15; Ex. 54 § 15.) Under New York law, the parties' NDA could not be modified except by "an oral *agreement* to alter the written contract." *Grandonico v. Consortium Commc'ns Intl., Inc.*, 566 F. Supp. 1288, 1291 (S.D.N.Y. 1983). "[C]onduct itself cannot produce a modification of the contract. Conduct can at best be evidence of 'an agreement based upon consideration' between both parties to modify the existing contract." *S. Fed. Sav. & Loan Ass'n of Georgia v. 21-26 E. 105th St. Assocs.*, 145 B.R. 375, 381 (S.D.N.Y. 1991). Thus, merely pointing to employee conduct is not enough; Teradata must proffer evidence of an *agreement* to modify or waive the marking provision – evidence that is entirely lacking here. *See Big Vision Priv. Ltd. v. E.I. DuPont de Nemours & Co.*, 1 F. Supp. 3d 224, 255

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[3] The Court also cited *Vesta Corp. v. Amdocs Mgmt., Ltd*, 2018 WL 4354301 (D. Or. Sept. 12, 2018), where the parties' contract was ambiguous as to whether information needed to be marked to be treated as confidential. (Dkt. 65 at 8:25-28.) But under *Vesta*'s own reasoning, the SAP-Teradata NDA was not ambiguous because "unlike in [that] case, the marking requirement was referenced in the definition of confidential information." *Vesta*, 2018 WL 4354301, at *9; *see* Exs. 53, 54 § 2.

(S.D.N.Y. 2014) (granting summary judgment for failure to mark and rejecting argument that parties modified marking requirement through course of conduct; "such an argument runs headlong into the text of the NDAs, which quite clearly prohibit oral modification except upon written agreement by both parties").

Even if *PQ Labs* were to apply, there is no evidence that Teradata notified SAP, through other means, that the information conveyed by Mr. Graas was confidential. Lacking that, Teradata relies on the fact that [redacted] (Ex. 2 at 57:6-10; *see also* Ex. 40 at 43:8-15; Ex. 10 at 84:5-15.) But subjective understanding of the MNDA cannot control over the contract's "objective meaning." *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 948 N.Y.S.2d 292, 296 (2012); *see also BDT Prod., Inc. v. Lexmark Int'l, Inc.*, 124 Fed. Appx. 329, 331 (6th Cir. 2005) (because disclosure agreement between parties did not require defendants to keep plaintiff's information confidential, the subjective "understanding of the companies is irrelevant."). This is especially so where, as here, Teradata's employees were simply unfamiliar with the contract. [redacted] (Ex. 10 at 86:18-23.) Other Teradata employees [redacted] (Ex. 3 at 67:9-16; Ex. 28 at 59:15-21; Ex. 27 at 80:21-25.) Teradata's claims fail because there is no evidence that Teradata notified SAP, in writing or "by other means" that Mr. Graas's communications were confidential.

3. The Bridge Project Agreements Give SAP the Right to Use the Supposed Batched Merge Method in Any SAP Product.

Even if Mr. Graas's various communications qualified as "Confidential Information" under the NDAs, SAP still was entitled to use the information – not just for purposes of the Bridge Project, but in *any* product. Teradata's description of the purported "batched merge method" has been vague and shifting throughout the case. But no matter how the supposed trade secret is characterized, SAP has an unambiguous contractual right to use it.

(a) SAP Owns the Interface and Conceptual Design that Implemented the Supposed Batched Merge Method.

Teradata's supposed "trade secret" is alleged to have been incorporated into the Bridge Project software (the MaxDB Bridge, also called the Teradata Foundation)—and then allegedly into the interface between SAP applications and HANA ("Native FAE"). That software and its conceptual design is SAP property.

Section 10 of the SDCA [redacted] (Ex. 55 § 10.1 (emphasis added).) SAP also owns the rights to the [redacted] (*Id.*) [redacted] (*Id.* § 1.11.) [redacted] (*Id.* § 1.2.) Further, [redacted] (*Id.* § 1.8.)

According to Teradata's expert, Mr. Graas [redacted] (Ex. 20 at 84:25-86:22.) In turn, he claims that [redacted] (*Id.* at 85:2-11.) Thus, it is uncontroverted that Teradata's purported trade secret [redacted] Ex. 10 at 229:14-232:23.) By the SDCA's plain terms,

these modifications and/or design architecture, guidelines, or specifications to SAP's software belong to SAP.

(b) At the Least, SAP is Authorized to Use Graas' Input in Any Product.

To the extent Teradata's claimed trade secret is not something incorporated into the MaxDB Bridge or conceptual design behind it, but some lesser conversations surrounding it, SAP still is entitled to use the supposed batched merge method in any product. Both the SDCA and the nondisclosure agreements [redacted] (*See* Ex. 55 §§ 9.4, 12; Exs. 53, 54 § 7.) The SDCA's "License" section sets forth the parties' rights to use information shared by the other party during the Bridge Project. Teradata granted to SAP a [redacted] (*Id.* § 9.4 (emphasis added).) This license included the [redacted] (*Id.* (emphasis added).) Moreover, the license provides that [redacted] (*Id.*) In turn, [redacted] (*Id.* § 1.6.)

Mr. Graas's dialogue with SAP engineers qualifies as [redacted]. (*See* Ex. 55 § 1.6.) At most, Mr. Graas provided suggestions—*i.e.*, "an idea or thought suggested, a proposal" (*Suggestion*, Oxford English Dictionary (2020))—about how to approach a

command/query coming from SAP applications. Mr. Graas's suggestions were conveyed as part of a back-and-forth dialogue with SAP engineers about how best to modify a *SAP* command to work more efficiently with the Teradata database. (*See* Exs. 46, 47, 51; Ex. 36 at 57:16-58:15, 133:16-134:4; Ex. 30 at 307:10-308:9; Ex. 14 at 145:17-146:15.) The SDCA's plain text makes clear that these types of suggestions—suggestions from one party about how to modify the *other* party's products—are useable outside the context of the Bridge Project.

The same conclusion follows from the text of the MNDA, which states that [redacted] (Exs. 53, 54 § 7.) Like the SDCA, the parties' non-disclosure agreements make clear that if Teradata provided suggestions to SAP about how to modify SAP's *own* products, those suggestions could be used by SAP for any purpose and without restriction. Once again, Mr. Graas's comments fit squarely within this provision. [redacted] (Ex. 54 § 7.)

(c) Teradata's Theory of Liability Contravenes the Parties' Intent.

Teradata argues that permitting SAP's use of the supposed batched merge method outside the context of the Bridge Project would upset the parties' reasonable expectations. But Teradata has it backwards. The structure of the SDCA makes clear that the parties intended to distinguish between two distinct circumstances. Where one party shared its *own* software as deliverables under the project, that software was to be used only for purposes of the Bridge Project. (*See* Ex. 55 § 9.2) But where one party (*e.g.*, Teradata) provided suggestions about how to modify or improve the *other* party's own products, the SDCA ensures that the other party (*e.g.*, SAP) is able to continue selling its own software products even if modified per those suggestions and/or added to another SAP product. (*See* Kraska Decl. Ex. ¶ 369.) This dichotomy reflects the parties'

recognition that, to make the Bridge Project work, SAP had to modify its own software, including the interface. To the extent Teradata made suggestions about how to modify *SAP* software, SAP could not be expected (and, according to Teradata's own contemporaneous communications, was not expected) to limit use of any such beneficial changes to the Bridge Project. (Ex. 5 at 20:10-18; Ex. 92 at 3; Ex. 63; Ex. 9 at 212:13-213:10.) To the contrary, SAP had a business obligation to share any improvements realized during the Bridge Project with SAP's many customers and partners. (Ex. 56; Ex. 6 at 307:8-12.) Because the unambiguous terms of the parties' contract gave SAP ownership of the interface and its conceptual design and/or authorized SAP to use Graas's suggestions outside the context of the Bridge Project, SAP is entitled to summary judgment on Teradata's batched merge method trade secret claims.

4. Teradata's Federal Business Trade Secrets Claim Fails.

As a tag-along to its batched merge method trade secret claims, Teradata contends that SAP misappropriated three categories of trade secrets (Ex. 72 at Nos. 54-56) that relate to marketing documents supposedly brought to SAP by former Teradata employees. The Court also should grant summary judgment on Teradata's federal claim based on these "business" trade secrets.

Teradata maintains that [redacted] (Ex. 71 at 62-63 (Rog 3).) Teradata further claims that [redacted] (*Id.* at 62-67.) To remedy this purported misappropriation, Teradata asserts a cause of action under California's trade secret law and under the Defend Trade Secrets Act ("DTSA"). (Dkt. 67 ¶¶ 103-111.) But the DTSA applies only to acts occurring on or after May 11, 2016. Thus, to survive summary judgment, Teradata bears the burden of proving that an act of misappropriation occurred after that date. *Progressive Sols., Inc. v. Stanley*, 2018 WL 2585374, at *5 (N.D. Cal. Apr. 24, 2018); *HighMark Digital, Inc. v. Casablanca Design Centers, Inc.*, 2020 WL 2114940, at *18 (C.D. Cal. Mar. 26, 2020).

While Teradata claims that [redacted]

(Ex. 71 at 21-22 (Rog 2)), none of the communications it cites post-date May 11, 2016. (*See id.* at 21 (citing Ex. 71 (Rog 3)); Ex. 71 at 8 (Rog 1); Ex. 72 at Nos. 54-56). None of the use, circulation, or misappropriation Teradata alleges with respect to these documents post-dates May 11, 2016. (*See id.*; *see also* Ex. 73 ¶ 25 & n.12, ¶¶ 26-27, ¶ 96 & nn.201-204, ¶ 196 & n.417, ¶¶ 207-229 & nn.432-491, ¶¶ 232-259 & nn.503-556). And all of the SAP sales Teradata claims occurred as a result of the alleged misappropriation and purportedly harmed Teradata or benefitted SAP occurred *prior to* May 11, 2016. (*See* Ex. 73 ¶¶ 232-259 & nn.503-556). Accordingly, Teradata cannot maintain a DTSA claim based on the alleged business trade secrets.

B. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON TERADATA'S ANTITRUST CLAIMS.

1. Teradata's Attempted Monopolization Claim Fails Because There Is No Evidence of a Dangerous Probability of Monopolization.

In Count V of its complaint, Teradata alleges that SAP is attempting to monopolize the enterprise data warehouse market in violation of § 2 of the Sherman Act. (Dkt. 67 ¶¶ 143-155.) Yet there is no genuine dispute of material fact that SAP lacks a dangerous probability of acquiring monopoly power in that market.

To prove its attempted monopolization claim, Teradata must establish, *inter alia*, a dangerous probability of achieving "monopoly power." *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432-33 (9th Cir. 1995). Monopoly power is "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (quotation marks omitted). "[T]o determine whether there is a dangerous probability of monopolization," the plaintiff first must define "the relevant market" and then identify the defendant's "market power" within that market. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455-56 (1993).

According to Teradata's expert, [redacted] (Ex. 64 ¶ 78.) Even accepting that market definition as appropriate for purposes of the attempted monopolization claim, no reasonable juror could find there is a dangerous probability of SAP monopolizing it.

"It requires no great familiarity with the law of antitrust to know that evidence of a defendant's market share is the principal tool used by courts to determine the existence of

monopoly power." *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 521 (5th Cir. 1982). "When the claim involves attempted monopolization, most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price." *Rebel Oil*, 51 F.3d at 1438; *see also U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 1001 (11th Cir. 1993) ("[B]ecause Rule possessed less than 50% of the market . . . there was no dangerous probability of success . . . as a matter of law."); *United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976) (no dangerous probability of success where market share was "about 50%").

Teradata's antitrust expert, John Asker, presents *no* evidence of SAP's share of his alleged market. (Ex. 64 ¶ 168; Ex. 1 at 148:9-149:19.) And Teradata identifies no other evidence by which SAP's share could be determined. (Ex. 1 at 149:21-157:9.) This evidentiary failure alone warrants summary judgment. *Sidibe v. Sutter Health*, 2021 WL 879875, at *9 (N.D. Cal. Mar. 9, 2021). To be sure, Dr. Asker points to SAP's shares of relational and analytical database sales.[4] (Ex. 64 ¶ 168.) Yet SAP's shares of relational and analytical database sales – [redacted] respectively – do not approach monopoly power. (Ex. 64 ¶ 168; Ex. 1 at 159:14-161:4.) Furthermore, Dr. Asker's figures show that SAP's share of relational database sales [redacted] (Ex. 66). If SAP controls barely 10% of the only proximate market measured, there is "no possibility of [SAP] achieving monopoly power."[5] *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1461 (9th Cir. 1993).

Moreover, the data shows that new entrants like Amazon are snatching up market share. (Ex. 66 ([redacted].) Witnesses on both sides agree that [redacted]

[4] A "relational" database is a type of database that stores and provides access to data points that are related to one another. (Ex. 38 at 49:22-50:13.) A relational database can be either transactional or analytical – both HANA and Teradata's database are "relational." (Ex. 38 at 24:20-26:7, 33:18-34:10; Ex. 41 at 21:8-12.)

[5] Indeed, only one entity, Oracle, has more than 30% of the relational database market and several other manufacturers—Microsoft, IBM, and Amazon—have a larger market share than SAP. Perversely, by going after a smaller player in the market, Teradata's claim seeks to achieve "potentially devastating effect … on the very competition" antitrust law "is supposed to foster." Phillip E. Areeda, Antitrust Law ¶ 807b5 (2020).

disruption and some of the trends happening in the market such as the transition to cloud." (Ex. 37 at 250:8-16.) As Teradata's witness put it, "[redacted] (Ex. 44 at 41:24-42:4.) Since 2013, [redacted] (Ex. 57 at TD05878640.) In light of these competitors' market shares rapidly rising—at the expense of traditional competitors—the notion that *SAP* threatens to monopolize the EDW market for large enterprises is untenable. *See In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1467 (C.D. Cal. 1988) (granting summary judgment because plaintiff "failed to present any evidence supporting the dangerous probability of success element" when defendant's market share was less than 12%).

2. Teradata's Tying Claim Must Be Assessed Under the Rule of Reason.

In Count IV of its complaint, Teradata alleges that SAP's purported "tying" of its "Top-Tier ERP Applications (the tying product)" to HANA "(the tied product)" is "per se unlawful." (Dkt. 67 ¶¶ 89, 132, 138.) Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The Supreme Court has long recognized that "the phrase 'restraint of trade' is best read to mean 'undue restraint.'" *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018) (citation omitted). "Restraints can be unreasonable in one of two ways." *Id.* "A small group of restraints are unreasonable per se because they always or almost always tend to restrict competition and decrease output." *Id.* (citation marks and quotations omitted). Restraints that are not unreasonable per se are judged under the "rule of reason," which requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. *See FTC v. Qualcomm Inc.*, 969 F.3d 974, 989 (9th Cir. 2020).

Per se analysis allows "condemnation without inquiry into actual market conditions" based on precedent that deems certain contractual arrangements "unreasonable as a matter of law." *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9, 15 (1984). While application of

the *per se* test has been sharply criticized as "wildly wrongheaded" in the context of tying claims (Phillip E. Areeda, Antitrust Law ¶ 1709a (2020)), the Supreme Court has recognized that "*certain* tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" *Hyde*, 466 U.S. at 9 (emphasis added). However, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations." *Broad. Music, Inc. v. CBS,* 441 U.S. 1, 9 (1979). The *per se* rule thus is appropriate only where experience teaches that the alleged conduct "has so little redeeming virtue, and that there would be so very little loss to society from its ban, that an inquiry into its costs in the individual case [can be] considered [ ] unnecessary." *United States v. Microsoft Corp.*, 253 F.3d 34, 94 (D.C. Cir. 2001) (internal quotation marks and citations omitted).

This is not such a case. While the parties disagree about the effects of SAP combining its ERP software (S/4HANA) with the underlying database (HANA), it is uncontroverted that S/4HANA is technologically integrated with HANA. SAP's prior ERP applications kept substantial functionality in the application layer, so as to make it easier to port to multiple databases. (Mehrotra Decl. Ex. ¶¶ 125, 158-159.) One of S/4HANA's innovations is to push functionality down to the database layer, which required writing S/4HANA's code to integrate more tightly with an underlying database. (*Id.* ¶¶ 136-155.) Teradata does not dispute these basic facts.

In this kind of "technological tying" case, application of the *per se* rule is inappropriate because of the risk that it "would unjustifiably deter the development and introduction of those new technologies so essential to the continued progress of our economy." *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 542–43 (9th Cir. 1983). Recently, the Ninth Circuit reaffirmed in *Qualcomm* that "novel business practices—*especially* in technology markets—should not be 'conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" 969 F.3d at 990-91 (citation omitted); *see also In re: Cox Enters., Inc.*, 871 F.3d 1093, 1102 (10th Cir. 2017). Because the Supreme Court has not considered application of the *per se* rule where a tied software product is "technologically integrated with the tying good," application of the *per se* rule

in that circumstance "creates undue risks of error and of deterring welfare-enhancing innovation." *Microsoft*, 253 F.3d at 89-90; *see also* Phillip E. Areeda, Antitrust Law ¶ 1757c (2020) ("most product design or redesign that creates product interdependence is procompetitive").

Qualcomm relied on the D.C. Circuit's 2001 opinion in *Microsoft*. *See Qualcomm*, 969 F.3d at 990. There, the United States charged Microsoft with bundling its Windows operating system and Internet Explorer browser. *See* 253 F.3d at 83-84. The court observed that integration of operating systems and browsers was common, even among firms without market power, which indicated there were "efficiency gains from doing so." *Id.* at 93. Moreover, Microsoft proffered evidence that bundling an operating system and browser improved the functionality of the operating system itself. *Id.* at 90. The D.C. Circuit did not have to "pass judgment on Microsoft's claims regarding the benefits from integration" to conclude that application of the *per se* test was inappropriate; it was enough that these "purported efficiencies suggest that judicial 'experience' provides little basis for believing that" Microsoft's integration lacked any redeeming virtue and therefore should be presumed unreasonable. *Id.* at 90-91; *see also Apple iPod iTunes Antitrust Litig.,* 2009 WL 10678931, at *5 (N.D. Cal. May 15, 2009) ("this Court is not aware of any case where *per se* tying liability was found on the basis of a technological tie").

Similar considerations here weigh strongly against application of the *per se* rule. To be clear, the Court need not conclude that SAP's "integration is welfare-enhancing or that it should be absolved of tying liability" to reject application of the *per se* rule. *Microsoft*, 253 F.3d at 89. Rather, the *per se* framework is appropriate only if the Court can "comfortably say" that the bundling of ERP applications and databases, by *any* software manufacturer, has so little redeeming virtue that an inquiry into its procompetitive benefits in a specific case is unnecessary. *See id.* at 94. There is no basis to reach that conclusion with respect to the business practices at issue here.

As in *Microsoft*, many leading vendors of ERP applications also bundle their applications with an underlying database. [redacted] (Ex. 17 at 13:20-14:2.) Similarly, [redacted]

[redacted] (*Id.* at 41:12-20.) [redacted] (*Id.* at 34:4-18; *see also id.* at 34:19-35:4 [redacted] (*Id.* at 49:15-50:14; *see also id.* at 34:19-35:4, 47:10-18.) Likewise, Microsoft's Dynamics ERP application runs only on Microsoft's "SQL Server" database. (Ex. 74 ¶ 4.) Microsoft designed Dynamics 365, its SaaS application, with its Microsoft Azure SQL database "integrated as part of the solution." (*Id.*) [redacted] (Ex. 22 at 91:5-92:1; Anicich Decl. Ex. ¶ 38.) This "ubiquity of bundling" between ERP applications and databases "should give courts reason to pause before condemning" it as *per se* unreasonable. *Microsoft*, 253 F.3d at 93.

Further, as in *Microsoft*, SAP has proffered evidence that its design of S/4HANA to integrate with HANA improves functionality. (*See* Mehrotra Decl. Ex. ¶ 138 ("designing S/4HANA to operate closely with HANA offered several technical and practical benefits to SAP"); *see also id.* ¶¶ 140-198.) Teradata disputes the benefits of bundling and contends that they do not outweigh the alleged anticompetitive effects of SAP's conduct. But that is not the relevant issue for purposes of the *per se* framework. The question, rather, is whether it would be appropriate to judge the integration of S/4HANA with HANA under a rule that *ignores* any benefits of that integration entirely. *See Microsoft*, 147 F.3d at 89. For the reasons set out in *Microsoft*, *Qualcomm*, and *Foremost Pro Color*, application of the *per se* rule in this case would risk deterring innovation and "may make consumers worse off." *Id.* The Court should hold instead that Teradata's tying claim must be analyzed under the rule of reason.

3. Teradata's Tying Claim Fails Under the Rule of Reason.

To maintain a claim under the rule of reason, Teradata must "delineate a relevant [tied] market" and show that SAP "plays enough of a role in that market to impair competition significantly." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). Teradata cannot make that showing for two independent reasons. *First*, Teradata has not properly defined a tied

market in which SAP actually competes, much less has caused harm to competition. And because Teradata does not compete in any properly defined tied market, it lacks standing to bring a tying claim. *Second*, even if Teradata's definition of the tied market was viable, Teradata cannot show any actual injury to *competition* in that market.

(a) Teradata Has Not Properly Defined a Tied Market in Which HANA Competes.

Teradata's expert claims that [redacted] (Ex. 64 ¶ 78.) And he opines that [redacted] (*Id.* ¶¶ 79-80.) But Teradata's own witnesses confirm that, even when purchased independently for analytics use, HANA does *not* compete in the EDW space. And, certainly, HANA sold for transactional use pursuant to a limited runtime license does not compete in the EDW space. "[I]n determining the relevant market the courts are not free to accept whatever market is suggested by the plaintiff as fitting most persuasively with his contention that his power to compete effectively has suffered injury." *Gough v. Rossmoor Corp.*, 585 F.2d 381, 389 (9th Cir. 1978). Because Teradata's evidence could not "sustain a jury verdict" where the tied market is EDW databases with OLAP capabilities for large enterprises, "summary judgment is appropriate." *Rebel Oil*, 51 F.3d at 1435; *see also Truck-Rail Handling Inc. v. BNSF Ry. Co.*, 2005 WL 8178364, at *8 (N.D. Cal. Mar. 8, 2005) (granting summary judgment on market definition because plaintiff's evidence did not "assist in evaluating cross-elasticity of supply and demand").

The term EDW describes what *Teradata's* database does: [redacted] (Ex. 43 at 15:1-8; *see also* Ex. 42 at 28:23-29:5; Ex. 8 at 42:12-16.) Teradata's own witnesses admit that customers do not use HANA for this purpose. Christopher Twogood, Teradata's senior vice president of global marketing, testified that [redacted]

[redacted] (Ex. 43 at 20:3-22:15.) In the same vein, a senior manager in Teradata's corporate intelligence unit, Allen Licitra, testified that [redacted] (Ex. 24 at 39:18-40:21, 151:22-152:8; *see also id.* at 26:11-14 [redacted]

Dr. Asker reaches a contrary conclusion only by conflating two distinct concepts: he assumes that [redacted] (Ex. 65 ¶ 127 & n.308.) This is a fundamental, and critical, mistake. Some analytical database products have OLAP capabilities – but they are not necessarily used as an *enterprise* data warehouse, which "involves the centralized storage and integration of vast amounts of data collected from numerous sources across an entire business enterprise." (Dkt. 67 ¶ 16; Ex. 69 (RFAs 274, 277); Ex. 31 at 33:16-20 [redacted] Dr. Asker admits that [redacted] (Ex. 1 at 113:9-13; *see also id.* at 116:2-9 [redacted].)

Teradata will claim that SAP tried (largely unsuccessfully) to position HANA as an EDW when sold independently of S/4HANA. No matter. The Court does not need to resolve the issue of whether HANA, when sold independently of S/4HANA, competes in the alleged market for EDW products with OLAP capabilities for large enterprises. HANA sold independently for analytics use is not within the scope of Teradata's allegation that SAP has tied sales of S/4HANA to HANA, and therefore is irrelevant to the issue of the relevant tied market.

The issue is the relevant market for HANA when purchased with S/4HANA. Here, the determinative fact is that, when sold together with S/4HANA, HANA is [redacted] bundled with S/4HANA under a runtime license. And it is clear that a runtime license precludes use of HANA as an EDW. Teradata does not dispute that, since SAP released S/4HANA in 2015

(Stiroh Decl. Ex. ¶ 20), [redacted] (Decl. of Kevin Murphy Ex. at Exhibit 6.) With a runtime license, HANA can be used only to support the SAP application running on top of it. (Stiroh Decl. Ex. ¶ 18; Ex. 45 at 106:2-7; Ex. 37 at 15:16-16:8; Ex. 13 at 64:10-22; Ex. 86 at Slide 2.) Thus, a customer with a runtime license uses HANA as a transactional database to support S/4HANA. (Stiroh Decl. Ex. ¶ 176.) But an EDW, as defined by Teradata, must bring data from multiple sources across an enterprise, and then use sophisticated analytics tools to conduct analysis of that combined data. (Dkt. 67 ¶ 16; Ex. 68 at 8 [redacted] Ex. 42 at 36:19-37:4; Ex. 64 ¶ 83.) That kind of use is impermissible under a runtime license. (Ex. 21 at 163:15-164:3).

Teradata insists that HANA sold pursuant to a runtime license has OLAP capabilities and can perform analytics. True, but that does not make it an EDW. A runtime license imposes strict limits on the ability of a customer to import data into HANA or use third-party or custom-developed analytics tools on that data, which precludes a customer from using it as an EDW. (Ex. 76 at Slide 8 ("HANA Runtime for Lumira Server . . . Cannot do data modeling; Cannot be used for data mart or data warehouse scenarios"); Ex. 49 at 4 ("3rd Party Applications" and "Big Data Real-Time Analytics" only available with a full use license), *id*. at 10 (runtime customers have HANA's OLAP capabilities "but only use it for SAP Data"), *id*. at 12 ("Runtime only offers a restricted Platform with a centralized and static approach"); Ex. 75 at Slides 17 to 20.) As a result, customers with a runtime license use the OLAP capabilities of HANA to perform "embedded analytics" using only the built-in tools in S/4HANA and only on the limited set of data generated by the specific S/4HANA application running on that HANA installation. (Ex. 34 at 119:16-120:10.) As a result, HANA with a runtime license cannot be a functional substitute for an EDW. (Stiroh Decl. Ex. ¶¶ 179-182.) A customer with S/4HANA on HANA pursuant to a runtime license uses HANA as a transactional database and also to perform limited embedded analytics, but not to function as an EDW. (*Id.* ¶ 176.)

This leaves the small number of customers that purchase S/4HANA together with HANA

pursuant to a full use license. Teradata fails to present any evidence regarding how many such customers there are, or how many of them were subject to the alleged tie. One thing, however, is clear: the small number of customers that purchase S/4HANA together with HANA pursuant to a full use license also use HANA as a transactional database. Those customers are not legally prohibited from using HANA as an EDW, but there is no evidence that they do so. Teradata has failed to identify a single customer that has taken S/4HANA together with HANA pursuant to a full use license and used that HANA installation as an EDW. In fact, most Teradata customers that purchase S/4HANA and HANA continue to purchase an EDW product from Teradata. (*See, e.g.*, Ex. 26 at 44:19-45:25, 52:7-17; Leonard Decl. Ex. ¶¶ 54-68.)

The evidence is thus clear. The vast majority of customers that purchase S/4HANA with HANA pursuant to a runtime license might replace another *transactional* database—*i.e.*, their Oracle, IBM, or Microsoft OLTP database—with HANA, but they would not replace Teradata. (Ex. 37 at 212:1-16; Mehrotra Decl. Ex. ¶¶ 127-129; Ex. 69 (RFAs 281-288).) The relevant market for HANA sold with S/4HANA thus is a market for *transactional* databases, not EDW products. But Teradata has not properly defined that tied market, or presented any evidence of anticompetitive harm within it. (Murphy Decl. Ex. ¶ 18.)

(b) Teradata Lacks Standing to Challenge Any Tie in a Properly-Defined Tied Market.

Even assuming the alleged tie between S/4HANA and HANA harms competition in a transactional database market, Teradata, as the vendor of an analytical database, lacks standing to challenge SAP's conduct.[6] *See Am. Ad Mgmt., Inc. v. Gen. Tele. Co. of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 1999). Because "only those that are participants in the defendants' market can be said to have suffered antitrust injury," Teradata has no standing to challenge any alleged tie of S/4HANA to HANA. *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 158 (2d Cir. 2016). It is uncontested that [redacted] (Ex. 69 (RFA 292).) Therefore, Teradata's products lack the

[6] Teradata's lack of standing dooms its tying claim under both the *per se* and rule of reason frameworks. *See In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 744 (9th Cir. 2012).

functionality to replace HANA for SAP's S/4HANA customers. In other words, even if S/4HANA had been designed to work on databases other than HANA, Teradata's EDW products could never have been one of those databases. And if Teradata's products cannot substitute for HANA for S/4HANA customers, then the two products are not in the same product market. *See Golden Gate Pharmacy Services, Inc. v. Pfizer, Inc.,* 433 Fed. Appx. 598, 598–99 (9th Cir. 2011) ("The products alleged in a relevant market must be 'reasonably interchangeable by consumers for the *same purposes*.'").

(c) Teradata Cannot Show Harm to Competition Given SAP's Low and Declining Share of Databases.

Even if Teradata's definition of the tied market was supported by evidence, summary judgment still would be warranted because Teradata cannot show that SAP has caused actual injury to competition in a market for [redacted]

To establish an unreasonable restraint of trade under the rule of reason, the plaintiff bears the burden of proving the defendant's conduct "actually harmed competition," not merely a competitor. *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 789 (9th Cir. 1996). Teradata's expert does not purport to offer any direct evidence of actual anticompetitive effects in the relevant tied market, "such as reduced output, increased prices, or decreased quality" as a result of the alleged tie. *Am. Express*, 138 S. Ct. at 2284. Although Dr. Asker claims that [redacted] (Ex. 64 ¶ 150), he does not opine that prices are higher than they would be in a competitive market. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993) ("a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level"). Nor has Dr. Asker analyzed whether any competitors in his defined tied market other than Teradata have reduced their output as a result of the alleged tie. Dr. Asker concedes that [redacted] (Ex. 64 ¶ 87; Ex. 1 at 144:25-146:12.) Yet [redacted]

[redacted] (Ex. 65 ¶ 61; Ex. 1 at 174:19-182:18.)

Given the absence of any direct evidence of actual harm to competition, Teradata must rely on indirect evidence, which requires "proof of market power plus some evidence that the challenged restraint harms competition." *Am. Express*, 138 S. Ct. at 2284. But Teradata's claim fails under this approach as well. Unlawful market power can be demonstrated circumstantially by "show[ing] that the defendant owns a dominant share of [the relevant] market." *Rebel Oil*, 51 F.3d at 1434. Teradata cannot make such a showing because there is no genuine issue of fact concerning whether SAP's share of the alleged tied market is "dominant." To the contrary, it is undisputed that Teradata's expert lacks any evidence about SAP's market share in the market for [redacted] (Ex. 1 at 149:2-19.) The only relevant evidence in Dr. Asker's report is that [redacted][7] (Ex. 64 ¶ 168.) Such low shares preclude a finding of market power as a matter of law. *See, e.g.*, *Rebel Oil*, 51 F.3d at 1438 ("[A] market share of less than 50 percent is presumptively insufficient to establish market power."); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a prima facie case of market power."); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 494 (3d Cir. 1992) (no triable issue of fact when defendant controlled only 10% of tied market).

4. Teradata's Tying Claim Fails Also Because SAP Lacks Market Power in the Tying Market.

If all of that was not enough, Teradata's tying claim (under either the *per se* or rule of reason frameworks) fails also because SAP lacks market power in the tying market. "[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 46 (2006). If SAP lacks market power in the tying market, Teradata's claim must fail because, "in that case, [SAP] has no power to force, exploit, or coerce a" customer into purchasing the tied product. *Rick-Mik*

[7] At his deposition, Dr. Asker also testified that [redacted] (Ex. 1 at 160:11-17, 162:17-25, Murphy Decl. Ex. at Exhibit 21.)

Enters., Inc. v. Equilon Enters. LLC, 532 F.3d 963, 972 (9th Cir. 2008). Teradata has no proof of SAP's market power in the tying market. Teradata's expert concludes otherwise only by gerrymandering the tying market, artificially limiting it to a subset of "large" customers and just two competitors: Oracle and SAP.

Teradata, as the plaintiff, bears the burden of proving the relevant product market. *See United States v. Bazaarvoice, Inc.*, 2014 WL 203966, at *22 (N.D. Cal. Jan. 8, 2014). Dr. Asker opines that [redacted] (Ex. 64 ¶ 46.) Asker's market thus includes two significant limitations. First, [redacted] (*Id.* ¶ 48.) Second, Dr. Asker opines that the relevant market includes only [redacted] *Id.* ¶ 50.) Working from this artificial market definition, Asker concludes that [redacted] (*Id.* ¶ 109.)

In *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1125 (N.D. Cal. 2004), Judge Walker rejected a virtually-identical product market definition, and Teradata's attempt to reassert such a market here fails for the same reasons. *Oracle*, like this case, involved competition among vendors of ERP software. The key issue was how to define the market for such software. The DOJ, as plaintiff, claimed that there was a market limited to "core" ERP software for human relations management and financial management systems, and that this market was further limited to those core ERP products "able to meet the needs of large and complex enterprises." *Id.* at 1102. And like Teradata, the DOJ claimed the only competitors in this market were Oracle, PeopleSoft (which Oracle acquired), and SAP. *Id.* at 1107. The court rejected this "very restricted" market definition, *id.* at 1125, finding that it excluded numerous sources of competition—including "mid-market vendors"—that served as substitutes for the finance ERP products offered to large enterprises by Oracle and SAP. *Id.* at 1159-61. For the same reasons, no reasonable juror here could conclude that the same market definition that Judge Walker

rejected is a valid one.

As in *Oracle*, Dr. Asker "presents no reliable economic basis to limit the alleged market to large enterprises only." (Stiroh Decl. Ex. ¶ 28.) As explained in SAP's concurrently-filed *Daubert* motion, a product market must include economic substitutes, *i.e.*, products that would see increased demand in response to a price increase in another product. Dr. Asker concedes, however, that [redacted] (Ex. 1 at 49:15-19.) Instead, much like plaintiffs in *Oracle*, Teradata, "in reaching this strange product market, clearly worked backwards from their desired result: finding a group of customers all of which had purchased SAP, Oracle or PeopleSoft ERP, then claiming that those customers were 'similarly situated' and defined the market." 331 F. Supp. 2d at 1154. The evidence that Teradata's expert relies upon to substantiate his market definition, moreover, is "circumstantial and highly qualitative," *id.* at 1158, and none of it creates a genuine issue of material fact. For example, [redacted] (Ex. 64 ¶ 62), which, by his own admission, [redacted] (*Id.* ¶ 59; Stiroh Decl. Ex. ¶ 90.) [redacted] (Ex. 64 ¶ 62.) [redacted] (Ex. 64 ¶ 66.) But that data does not reflect actual purchase decisions; nor do the number of times competitors are mentioned in such data indicate what customers would do in response to a change in price. (Ex. 64 ¶ 65; Ex. 1 at 68:23-69:5.) Dr. Asker's aggregate diversion analysis is not a price-based analysis, and therefore is not a substitute for cross-elasticity of demand. (Stiroh Decl. Ex. ¶ 36.) In short, Teradata has failed to produce evidence of cross-elasticity of demand sufficient to establish core ERP products for large enterprises as a relevant antitrust market. While Teradata and its experts insist there must be "something different" about the ERP products sold by SAP and Oracle, this is not enough to support a relevant product market definition as a matter of law. *Oracle*, 331 F. Supp. 2d at 1159.

V. CONCLUSION

For these reasons, the Court should grant summary judgment to SAP on trade secret numbers 24-31 and 58-59, and on Teradata's antitrust claims. The Court should also grant summary judgment to SAP on Teradata's DTSA claim based on trade secret numbers 54-56.

Dated: August 25, 2021

JONES DAY

By: *s/ Tharan Gregory Lanier*
Tharan Gregory Lanier

Counsel for Defendant/Counterclaim-Plaintiff SAP SE and Defendants SAP AMERICA, INC. and SAP LABS, LLC